Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:

Application of BellSouth Corp.; BellSouth	)	
Telecommunications, Inc.; and BellSouth Long	)	**CC Dkt. No. 97-231**
Distance, Inc. for Authorization To Provide	)	
InterLATA Services In the State of Louisiana	)	

To: The Commission

Reply of Ad Hoc Coalition of Corporate Telecommunications Service Managers and Telecommunications Manufacturing Companies

This Reply responds to the two theories offered by commenters to support an FCC finding that grant of the present application is contrary to the "public interest" as that term is used in Section 271(a)(3)(C) of the Act. In section I, we show that accepting the first theory would unlawfully expand the competitive checklist and would be inconsistent with the FCC's effort to leave the impression that it is abandoning the practice of preempting state PUC authority with expansive claims of FCC jurisdiction. In section II, we show that accepting the second theory would unlawfully reverse important FCC regulatory policies.

I. Finding that Grant of a Section 271 Application Violates the Public Interest Because the Applicant has Not Opened Its Exchange Market In More Ways than Required by the Competitive Checklist Would Unlawfully Expand the Checklist and Would Be Inconsistent with the FCC's Stated Desire to Avoid Expansive Claims of FCC Jurisdiction At State PUC Expense

Although commenters argue that granting this application would violate the public interest because BellSouth's exchange market has not been opened in ways that go beyond those

mandated by the statutory checklist,[1] the FCC should not deny the application on this basis for two reasons. Each is discussed below.

First, while commenters claim that Congress provided an "unambiguous" grant of jurisdiction to mandate the specific market opening measures they favor --- a showing which the Eighth Circuit has held on three separate occasions must be made[2] -- they are wrong. AT&T and Sprint assert that Senate rejection of an amendment providing that "[f]ull implementation of the checklist . . . shall be deemed in full satisfaction of the public interest" constitutes the necessary unambiguous grant of jurisdiction.[3] In fact, rejection of that amendment merely confirms what is made clear elsewhere in the legislative history -- that Congress expects the FCC to determine the public interest based on whether the applicant's provision of interLATA service will stimulate competition in the interLATA service and telecommunications manufacturing markets.[4]

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[1] See MCI at 80-81, TRA at 43-44 (BellSouth must first lose exchange market share); TRA at 43, WorldCom at 37-38, and Sprint at 81-82 (BellSouth must first lower its interstate access charges to a level which is below what existing FCC rules contemplate); WorldCom at 38 (CLECs must first obtain a larger share of the USF); AT&T at 83, MCI at 82-84, WorldCom at 38, and TRA at 38, 42 (FCC must first require BellSouth to comply either with the agency's former "rebundling" rule, its former "pick-and-choose" rule, or both of these former rules); DOJ at 34 (BellSouth must first prove that its exchange market is "fully" and "irreversibly" open to competition); MCI at 80 (BellSouth must first prove that the services and facilities it provides to CLECs permit CLECs to "remain viable"); CPI at 2-11 (BellSouth must first prove that Louisiana residents have a "realistic choice" of exchange carriers); and Intermedia at 14-15 (Louisiana PUC must first speed the processing of Intermedia's application for authority to provide exchange service).

[2] Iowa Util. Board v. FCC, 120 F.3d 753, 796 (8th Cir. 1997), reh'g, slip op. at 2-3 (8th Cir. Oct. 14, 1997). See also Calif. v. FCC, 124 F.3d 934, 940-41 (8th Cir. 1997).

[3] AT&T at 91-92, Sprint at 69-70.

[4] Although several commenters try (unsuccessfully as shown below in Section II of this Reply) to prove that BellSouth's provision of interLATA service would harm interLATA service competition in that state, no commenter disputes the Ad Hoc Coalition's argument that granting
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MCI claims that an unambiguous grant of power to mandate exchange market opening measures beyond those set forth in the checklist is found in the fact that one important purpose of the 1996 Act is to open "all telecommunications markets to competition".[5/] In fact, while the Act as a whole is designed to open all telecommunications markets, each discrete section of the Act serves more limited purposes. Section 271(c)(2)(B)'s competitive checklist, for example, defines the FCC's authority to open the exchange market to competition, whereas Section 271(d)(3)(C)'s authority to determine whether grant of an application is in the public interest gives the agency power to ensure that a Bell company's involvement in interLATA service will promote competition in that market as well as in telecommunications manufacturing.

Significantly, the Justice Department appears to back away from the erroneous claim of "unambiguous" authority that it made in its comments on BellSouth's South Carolina application. In those comments, the Department had asserted that, by requiring the Commission to give "substantial weight" to the Department's views, Section 271(d)(2)(A) unambiguously authorizes the FCC to extend the checklist in whatever manner the Department desires.[6/] Now, however, the Department merely notes -- correctly -- that, while the FCC must give substantial weight to the Department's views if the Department proposes that the FCC act in a manner that is consistent with the authority delegated by other statutes, the agency may ignore the Department's

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the application will stimulate competition in telecommunications manufacturing. See Ad Hoc Coalition Comments, Att. 2 at 15-25.

[5/] MCI at 80.

[6/] DOJ Comments at 44-45 (filed in proceeding to consider BellSouth's So. Car. Application).

comments to the extent they advocate an exchange market opening measure that Congress did not unambiguously authorize the FCC to mandate in another statute.[7/]

Even if the Commission possessed unambiguous authority to mandate exchange market opening measures beyond those in the statutory checklist (which it does not), the agency still should not exercise that power because doing so would be inconsistent with the recent commitment by the four new commissioners to avoid expansive assertions of FCC jurisdiction at state PUC expense.[8/] Mandating additional exchange market opening measures would be inconsistent with this commitment given that (i) the Eighth Circuit has held on three separate occasions that

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7/ DOJ at 20-21 (stating correctly that although the Department is free to comment on matters that are irrelevant to "the specific findings that the Commission is required to make . . . [to] approv[e] an application", the FCC must give DOJ comments on a specific matter "substantial weight" only if the comments are "relevant to any or all of those [required] FCC findings").

8/ For example, Chairman Kennard chose to deliver his first speech to the annual meeting of state PUCs, and in doing so stated that one of his three core policies will be "common sense decisionmaking", a concept he defined as "finding practical solutions to problems" by "forging a relationship between the FCC and states. . . ." Speech of FCC Chairman William E. Kennard to annual convention of Nat. Ass'n of Reg. Util. Comm'rs (Nov. 10, 1997) (text of speech released by FCC on Nov. 12, 1997). Commissioner Powell has made clear that he too thinks the FCC should end its jurisdictional war with state regulators:

> "[It's important for public officials to] have the courage to back away from our passions. . . . [I]f a door is closed, I'd like to see us go to the next door rather than keep pounding on the first one. . . . [The FCC should know when to] let go [and should avoid] being overly cute. . . ."

"Powell Urges FCC Restraint on Telecom. Act Appeals", Commun. Daily (Nov. 13 1997). Commissioner Furchtgott-Roth has expressed a similar sentiment:

> "I think the proper role of the FCC is to implement the law in close consultation with state and local governments. . . . I'll be very reluctant to [have] the commission being involved in lots of preemption [cases against state and local governments.]"

"At least two FCC Commissioners Now Appear Ready to Revisit Universal Service Order", Commun. Daily (Nov. 19, 1997). Commissioner Tristani has stated that she also hopes to "bridge the gap" between state regulators and the FCC. "Tristani says she will 'study up' before deciding issues", Commun. Daily (Nov. 18, 1997).

the FCC lacks jurisdiction to mandate exchange market opening measures in the absence of "unambiguous" statutory authority,[9] and (ii) state PUCs have made plain that they strongly believe that no such authority exists.[10]

II. The Claim that BellSouth's Provision of InterLATA Service Would Not Increase Competition In the InterLATA Service Market Must Be Rejected Since Accepting that Claim Either Would Reverse FCC Policy Without Complying with the Administrative Procedure Act or Would Be Based on the Unproven Assumption that BellSouth is Uniquely Untrustworthy In Complying with Regulatory Requirements

Those who conclude that BellSouth's provision of interLATA service is not in the public interest because it will harm interLATA competition base this conclusion on unsustainable assumptions. Below, we show why none of these assumptions can be accepted.

First, the FCC cannot lawfully accept the assumption that existing regulatory safeguards will fail to prevent BellSouth from extending its exchange market power to the interLATA market[11] since doing so would reverse existing regulatory policy without complying with

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[9] See n.2, supra.

[10] See "Pet. of [29]. . . State Commission Parties and the Nat. Ass'n of Reg. Util. Comm'rs for Issuance and Enforcement of the Mandate", filed in Iowa v. FCC, No. 96-3321 (8th Cir. Sept. 16, 1997) (asking the Eighth Circuit to enforce its mandate limiting the FCC's power to regulate exchange market opening measures to those set forth in the statutory checklist); state regulators filed this petition as a result of the previous FCC's announcement in its order denying the Ameritech §271 application that the agency might deny a §271 application unless the applicant opens its exchange market in additional ways than those mandated by the checklist. Four other state public utility commissions later informed the Eighth Circuit that they agree with the views of their 29 state PUC colleagues who filed the petition. Letter to M. Gans, Clerk of the 8th Cir. (Sept. 24, 1997). Some independent telecommunications investment analysts also have concluded that, unless moderated by the new FCC commissioners, courts will invalidate as overly expansive the previous FCC's assertion of jurisdiction to mandate exchange market opening measures in its review of §271 applications that exceed checklist requirements. See, e.g., "What Could Break the Bell Entry Statement? Triumph of Status Quo", Legg Mason Research Technology Team (Nov. 20, 1997) (the FCC's "expansive interpretation of its authority . . . [to guide] entry . . . is unlikely to legally survive").

[11] AT&T at 86-88, MCI at 92-97, Sprint at 75-80, TRA at 52.

Section 553(b) of the APA.[12] That statute requires a policy adopted in an agency proceeding to be a "logical outgrowth" of one which the agency had publicly proposed.[13] Basing the public interest determination in a Section 271 proceeding on the absence of regulatory safeguards to protect incumbent interLATA service providers from predation by the applicant would reverse the Commission's policy that safeguards are sufficient to protect interLATA competition from such predation.[14] Moreover, it would reverse that policy in violation of APA Section 533(b) because the FCC did not inform interested parties that a logical outgrowth of the agency's consideration of the present application might be reversal of this agency policy.[15]

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[12] 5 U.S.C. § 553(b).

[13] See, e.g., Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 459 U.S. 999, 1009-10 (1984) (FTC abused its discretion in using adjudication rather than rule making procedures to announce new national interpretation of UCC provision that reversed long-standing policies and was widely applicable); Montgomery Ward v. FTC, 691 F.2d 1322, 1328 (9th Cir. 1982) (rejecting in part FTC's attempt to impose new warranty requirements on Montgomery Ward because it had no notice of the new requirements).

[14] See, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order at ¶¶ 104 (CC Dkt. No. 96-149, rel. April 18, 1997) (safeguards will prevent improper cost allocation); id. at ¶ 119 (safeguards will prevent unfair discrimination against interLATA service competitors); id. at ¶ 126 (price cap regulation will prevent price increases above competitive levels); Access Charge Reform, Report and Order at ¶ 278 (FCC 97-158, rel. May 16, 1997) ("we have in place adequate safeguards against the exercise of a price squeeze by a Bell Company against its interexchange competitors"); Comments of the Federal Communications Commission as Amicus Curiae at 7, filed in U.S. v. West. Elec. Co., No. 82-0192 (D.D.C. March 13, 1987) ("the record three years after divestiture now establishes that there is little likelihood of competitive harm from BOC entry into most of the markets proscribed by the decree").

[15] No commenter has challenged the Ad Hoc Coalition's argument that the Commission could not lawfully find that grant of a §271 application is inconsistent with the public interest based on an absence of safeguards even if it had not previously concluded that existing safeguards were adequate since the agency was invited on numerous occasions in the past 15 years to adopt additional safeguards but declined to do so. See Ad Hoc Coalition Comments, Att. 2 at 38-39.

AT&T wrongly assumes that the 1996 Telecommunications Act's new regulatory paradigm somehow constitutes authorization to change position on the question of whether regulatory safeguards will prevent leveraging of a LEC's exchange market power into the interLATA service market.[16/] In fact, while the 1996 Act adopts new regulatory policies the question of whether existing regulatory safeguards will prevent unlawful leveraging is a question of fact rather than a question of policy, and none of the 1996 Act's new regulatory policies justifies a change in the FCC's longstanding conclusion on that question of fact.

Nor have commenters proved their claim that existing safeguards will be ineffective to protect interLATA service competition from predation on grounds that BellSouth is uniquely untrustworthy in complying with communications regulatory policies. Rather than offering evidence which shows that BellSouth is uniquely untrustworthy, commenters instead provide evidence which shows at best only that BellSouth and the commenters have disagreed about whether specific conduct is lawful.[17/]

The claim that BellSouth's involvement in the interLATA service market will produce no procompetitive effect because the market already is substantially competitive[18/] also must be rejected because it too would effectively reverse existing FCC policy without complying with the

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16/ AT&T Reply at 36-37 n.31 (filed in proceeding to consider BellSouth's So. Car. Application)

17/ See MCI at 85-86, AT&T at 88-89 (complaining that BellSouth's decision to petition for court review of FCC orders shows that it is untrustworthy even though the basis of each petition is BellSouth's contention that the subject FCC order is unlawful); Sprint at 72 (complaining about certain ILEC advertising while admitting that it is unclear whether this advertising is unlawful); MCI at 84-85 and ACSI at 51-53 (complaining about certain BellSouth marketing practices that have not been declared unlawful); AT&T at 89-90 (complaining about the large size of certain BellSouth exchange calling areas without alleging unlawful conduct in establishing these areas).

18/ AT&T at 93-95, MCI at 87-88, Sprint at 73-74.

APA requirement set forth above. While the FCC has held that much of the interLATA service market is substantially competitive, it has found that substantial competition may not exist in the provision of residential interLATA service, a significant part of the interLATA market as a whole,[19/] and it has adopted a number of regulatory requirements based on that finding.[20/] At no time did the Commission notify interested parties that a logical outgrowth of the present proceeding might be reversal of the core finding that underlies these existing regulatory requirements.[21/]

19/ Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order at ¶¶ 123-25 (FCC 96-424, rel. Oct. 31, 1996). See also Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, 11 FCC Rcd. 7141, 7183 (1996) (residential interLATA services may be subject to tacit price coordination); Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, 3314 (1995) (price coordination among interLATA service competitors may exist in the provision of interLATA service to residential customers); Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order, supra, at ¶ 92 (Bell company provision of interLATA service should "increase price competition and lead to innovative new services and marketing efficiencies").

20/ For example, the FCC has ordered AT&T to reduce the price of certain types of residential toll service to reflect decreases in the company's access costs (see Statement of Chairman Reed E. Hundt, Rept. No. 97-22 (Nov. 7, 1997)) and has required AT&T to employ special tariffing procedures when proposing to significantly change the interstate telephone service rates of residential customers (see Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, supra, 11 FCC Rcd. at 3317-18, 3357). Two consumer groups recently provided evidence that is consistent with the FCC's finding that the market for residential interLATA service may not be substantially competitive. In a letter dated November 26, 1997, the Consumer Federation of America and Consumers Union asked the FCC to investigate AT&T's November 3, 1997 tariff which raised the price of AT&T's basic schedule residential interstate toll service during 46 percent of the day by amounts ranging from 31 percent to more than 100 percent. See Letter to Hon. William Kennard (Nov. 26, 1997). The Louisiana PUC likewise has questioned whether the interLATA service market is competitive in Louisiana and has opened an investigation to find out. See Louisiana PUC Comments at 19.

21/ Chairman Kennard has made plain that he agrees with the FCC's long time position that Bell entry into the interLATA service market will increase competition in that market. In a recent speech, Kennard stated that "consumers don't get the full benefit. . . [of interLATA competition since] the Bell Companies are not permitted to offer in region long distance
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AT&T's claim that the Connecticut experience shows that BellSouth's provision of interLATA service will not cause interLATA service price reductions in South Carolina fails because it misrepresents the Connecticut experience.[22/] Even if SNET's interLATA service rates were no lower than those of its competitors as AT&T alleges -- an assertion that BellSouth seeks to disprove in its application -- AT&T itself aggressively markets a rate plan to Connecticut residences containing prices that are considerably lower than the least expensive rate plan that it aggressively markets to prospective residential customers elsewhere.[23/] The fact that SNET competes with AT&T in the interLATA service market is AT&T's only conceivable motive for providing this price discount in Connecticut, and it evidences that BellSouth's provision of interLATA service in South Carolina is likely to produce similar competitive benefits for people in that state.[24/]

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service." See printed remarks by Chairman Kennard prepared for delivery to Practicing Law Institute (Dec. 11, 1997).

22/ AT&T at 97. See also MCI at 88-89, Sprint at 74, DOJ Comments (Schwartz Supp. Affid.) at 32-34.

23/ See Ad Hoc Coalition Comments, Att. 2 to at 10-11.

24/ The identity of the commenter bears on the credibility of its opinion on the question of whether BellSouth's provision of interLATA service in Louisiana will stimulate interLATA service competition there. Those who would directly benefit from increased competition conclude unanimously -- in comments submitted from the perspective of interLATA service customers -- that competition in the interLATA market will increase if BellSouth is allowed to participate in that market See Comments of Ad Hoc Coalition; Nat. Bus. League; World Institute on Disability; Keep America Connected; and Organization Concerned About Rural Education, et al. By contrast, the claim that BellSouth's involvement in the interLATA service market will not increase competition in that market is made solely by parties with something to lose by increased competition -- incumbent interLATA service providers. See AT&T at 92-100, MCI at 87-92, Sprint at 73-75, WorldCom at 34-37.

CONCLUSION

The FCC should find that a grant of BellSouth's application will serve the public interest.

Respectfully submitted,

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Certificate of Service

I certify that on this 19th day of December, 1997 I served by First Class Mail a copy of the foregoing Reply of Ad Hoc Coalition of Corporate Telecommunications Service Managers and Telecommunications Manufacturing Companies to the parties at the following addresses:

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